Supreme Court, U.S.
FILED
OCT 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, et al.,

Petitioners,

v.

A. H. ROBINS COMPANY, INCORPORATED, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the order of a district court confirming a consensual reorganization plan containing a $2.3 billion trust fund for the benefit of personal injury claimants be reversed solely because the plan includes a provision enjoining creditors with personal injury claims from pursuing those claims against third parties, who are allegedly joint tortfeasors with the debtor, where: (i) the purpose of such injunction is to channel all such claims to a trust for payment; (ii) the district court has determined that the cash to be paid into that trust is sufficient to pay all such claims in full; and (iii) the funds to be used to pay such claims would not be available without the injunction?

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STATUTES INVOLVED

No statutes are cited in this brief.

COUNTERSTATEMENT OF THE CASE

Respondent Official Unsecured Creditors Committee (the "Committee") of A. H. Robins Company, Incorporated adopts the Counterstatement of the Case in the brief of Respondent A. H. Robins Company, Incorporated.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Official Unsecured Creditors Committee (the "Committee") of A. H. Robins Company, Incorporated ("Robins"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 880 F.2d 694.

REASONS FOR DENYING THE WRIT

A. Official Unsecured Creditors Committee Adopts Reasons for Denying Writ Set Forth in Brief of A. H. Robins Company, Incorporated.

The Official Unsecured Creditors Committee (the "Committee") of A. H. Robins Company, Incorporated ("Robins"), a respondent in this proceeding, joins with Robins in urging that petitioner's application for a writ of certiorari be denied. The Committee associates itself with the brief submitted by Robins, and submits this brief to set forth additional reasons of particular concern to the Committee, for the denial of petitioner's application.

B. Granting of Writ is Likely to Kill Robins' Reorganization Plan Involving Payment of All Estimated Dalkon Shield Claims and Other Debts of Robins.

The Committee represents lenders, trade suppliers, and other general unsecured creditors of Robins. These claims arose in the ordinary course of business and were unrelated to the Dalkon Shield product liability claims. It was, of course, the avalanche of Dalkon Shield claims that caused Robins to commence a Chapter 11 case, thereby necessitating that these unsecured claims await payment until consummation of a Chapter 11 plan of reorganization.

As a result of the impending acquisition of Robins by American Home Products Corporation ("AHP"), the Robins' plan of reorganization (the "Plan"), which has now been approved by the Bankruptcy Court and the District Court, and upheld by the Court of Appeals for the Fourth Circuit, achieves the remarkable result of paying in full all general unsecured claims and establishing a trust that the District Court found to be sufficient to pay in full all of the Dalkon Shield claims. When the Plan was submitted to a vote of the 195,000 Dalkon Shield personal injury claimants, 139,605 voted, of whom 131,761 (94.38%) voted in favor. Thus, a potentially tragic tale of endless litigation, with grave uncertainty concerning the availability of assets to satisfy the claims of nearly 200,000 Dalkon Shield claimants, is on the brink of a resolution.

The acquisition of Robins by AHP provides the funds for the settlement of the Dalkon Shield claims at full estimated value. Indeed, the amount made available to the personal injury claimants, by virtue of the acquisition of Robins by AHP, exceeds by approximately $750,000,000, the amount that would have been available to *all* unsecured creditors, including the Dalkon Shield claimants, if Robins were liquidated. Without the acquisition, and the resulting funding, a Plan providing full payment to creditors might never have emerged.

Of critical importance at this time is the fact that the agreement between AHP and Robins for the acquisition of Robins, and its subsequent merger into a subsidiary of AHP, expires on December 31, 1989, and if all appeals, including rehearing periods relating to the Plan, are not completed by that date, the acquisition and merger agreement may terminate in accordance with its express terms, along with the Plan that finally puts to rest one of the most serious mass tort episodes in our nation's history.

At this critical juncture, therefore, after years of extensive negotiation and litigation, this Plan is imperiled by virtue of petitioner's application for a writ of certiorari filed on behalf of fewer than 700 personal injury claimants, all of whose claims the District Court has found will be fully satisfied pursuant to the Plan. If the Plan is not consummated, it is likely to be years — if ever — before another plan of reorganization can be confirmed in the Robins Chapter 11 case, and there is no assurance that any future plan will again provide full payment to creditors.

Only an issue of transcendent importance should be permitted to derail the Plan that accomplishes so much for so many. For reasons fully explained in the Brief in opposition to the petition for writ of certiorari, filed by Robins, the Committee believes that the injunction provision of the Plan, the *sole* remaining point of objection, is not an issue of such dimension.

C. This Petition Should be Denied Regardless of the Court's Decision on the Contemporaneous Petition in *Anderson v. Aetna Casualty and Surety Company*.

Contemporaneously with the petition for writ of certiorari in this proceeding, a petition for writ of certiorari was filed in the "class action settlement" litigation, *Alexia Anderson v. Aetna Casualty and Surety Company* (89-442) ("*Anderson*"). The *Anderson* class action litigation involves a claim by Dalkon Shield claimants against Robins' insurer, Aetna Casualty and Surety Company ("Aetna"), that Aetna had conspired with certain individual defendants (including directors of Robins, and attorneys for Robins and Aetna) to damage the Dalkon Shield claimants. Neither the Committee nor Robins is a party to that litigation.

While expressing no opinion with regard to the petition in *Anderson*, the Committee takes this opportunity to emphasize to the Court that its decision with respect to the petition in this proceeding is in no way dependent on its decision with respect to the petition in *Anderson*. The petition in this proceeding should be denied regardless of the decision reached by the Court on the petition in *Anderson*.

The Plan does not require that the *Anderson* settlement be upheld in order for the merger and the Plan to be consummated. The Plan requires only that the *Anderson* settlement be approved by the District Court, but does not require that the settlement be upheld on appeal. Most importantly, the District Court found that the funding of the Plan, even without money from the *Anderson* settlement, was sufficient to pay all estimated Dalkon Shield claims in full.

The Plan operates independently of the class action litigation because it was carefully crafted to deal with the specific problems of Robins' liability to the Dalkon Shield claimants and its other creditors, regardless of whether the Court grants or denies the petition for writ of certiorari in *Anderson*. Indeed, the Plan expressly provides that it must be consummated upon denial of the petition for writ of certiorari in this case, even if the order of the District Court approving the class action

settlement is reversed or stayed pending appeal. Thus, if the Court denies the petition in this proceeding, the Plan will promptly be consummated. Funding will become available to pay the Dalkon Shield claims in an amount more than sufficient to pay the full amount of such claims as estimated by the District Court, and the general unsecured creditors represented by the Committee will be paid in full.

The Court's action on the *Anderson* petition will not affect the rights of any creditors or claimants in this proceeding. All creditors and claimants will be bound by the provisions of the Plan regardless of whether the class action settlement is upheld. If the petitioners in *Anderson* win the right to "opt-out" of the class that has been a party to the settlement, which is the sole relief they seek in *Anderson*, the exercise of that right would affect only their own case against Aetna. These claimants, if they "opt-out" of the class, might enlarge their opportunities with regard to Aetna, but their rights under the Plan would not be altered.

If, on the other hand, the Court denies the petition for certiorari in *Anderson*, or affirms the decision of the Court of Appeals, Aetna will provide additional cash and insurance for the payment of Dalkon Shield claims to provide even more funds for the satisfaction of such claims. In either event, the Plan, which is the subject of the petition in this proceeding, provides for payment to the Dalkon Shield claimants and other creditors in an amount greater than the value determined by the District Court even without any cash or insurance from *Anderson*.

It would be a grave injustice to all creditors of Robins, including the Dalkon Shield claimants, to have this painstakingly negotiated Plan, which has been approved by the overwhelming majority of claimants and creditors, frustrated by the petition for writ of certiorari in the *Anderson* class action proceeding, which has no bearing on the right of the parties to the Plan.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Dated: New York, New York
October 5, 1989

Respectfully submitted,

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